Fifth Circuit Precedent

ASYLUM, WITHHOLDING, CONVENTION AGAINST TORTURE

Cabrera v. Sessions, No. 15-60711, --- F.3d ---, 2018 WL 2106621 (5th Cir. May 7, 2018).

The Fifth Circuit held that the Board erred in requiring Cabrera to prove past persecution in order to establish a claim based on a fear of future persecution. The Fifth Circuit further held that the BIA erred by mischaracterizing the particular social group claimed by Cabrera. The Fifth Circuit concluded that the Immigration Judge failed to meaningfully consider all the relevant and substantial evidence supporting Cabrera's particular social group-based fear of persecution, which did not comply with the agency's standards and responsibilities, warranting remand.

Morales v. Sessions, 860 F.3d 812 (5th Cir. 2017).

The Fifth Circuit denied the petition for review, affirming the Board's denial of asylum, withholding of removal and CAT. The Fifth Circuit held that past persecution experienced by the petitioner's mother cannot be imputed to the petitioner, a 10 year-old girl from El Salvador. The Fifth Circuit further held that the petitioner's receipt of a single threat of harm does not constitute past persecution.

Iruegas-Valdez v. Lynch, 846 F.3d 806 (5th Cir. 2017).

The Fifth Circuit vacated the decision of the BIA and remanded for the agency to properly consider evidence under the "under color of law" legal standard. The Fifth Circuit noted that the BIA failed to bifurcate its CAT analysis, and, in adopting the IJ analysis, focused primarily on the willful blindness legal standard in determining whether there was sufficient state action involved in the respondent's torture, without considering "a number of different avenues" listed in the regulations. Specifically, the Fifth Circuit noted that neither the IJ nor the BIA considered whether the Iruegas-Valdez's evidence established that he was more likely than not to be tortured "by" or with the "consent of" government officials. Thus, the Fifth Circuit vacated the BIA's decision and remanded for the agency to consider the external evidence under the under color of law legal standard. *Garcia v. Holder*, 756 F.3d 885, 893 (5th Cir. 2014).

ADJUSTMENT OF STATUS & WAIVERS

None

BOND

None

CANCELLATION OF REMOVAL

Calvillo Garcia v. Sessions, 870 F.3d 341 (5th Cir. 2017).

The Fifth Circuit denied the petition for review, agreeing with the Board's finding that a sentence of up to one year confinement in a substance-abuse felony punishment facility as a condition of probation constituted a "term of imprisonment" under section 101(a)(48)(B) of the Act. The Fifth Circuit held that this interpretation of "term of imprisonment" is consistent with the plain meaning of 8 U.S.C. § 1101(a)(48)(B), which defines "term of imprisonment" to include a "period of incarceration or confinement ordered by a court."

CRIMINAL CASES IN THE IMMIGRATION CONTEXT

Vazquez v. Sessions, 885 F.3d 862 (5th Cir. 2018).

The respondent, who was convicted for possession of a controlled and dangerous substance pursuant to Oklahoma Statute Annotated, title 63, § 2-402(A)(1) (2013), petitioned for review of the Board's decision finding him removable under section 237(a)(2)(B)(i) of the Act—as an alien who, at any time after admission, has been convicted of a controlled substance violation. The Fifth Circuit found that the statute under which the respondent was convicted was facially overbroad under the categorical approach, as the Oklahoma controlled substance schedules contain at least two substances not included in any federal schedule. The Fifth Circuit, however, found that the respondent failed to argue in his brief that there was a realistic probability that Oklahoma would apply its controlled substances statute to conduct falling outside the generic federal controlled substances offense, and therefore waived his only viable argument on appeal that he was not removable pursuant to INA § 237(a)(2)(B)(i). The Court cited to the rule adopted by the Fifth Circuit in *United States v. Castillo–Rivera*, 853 F.3d 218, 224 n.4 (5th Cir. 2017), which states that "a defendant must point to an actual state case applying a state statute in a nongeneric manner, even where the state statute may be plausibly interpreted as broader on its face."

United States v. Herrold, 883 F.3d 517 (5th Cir. 2018).

The Fifth Circuit held that Texas's burglary statute, Texas Penal Code § 30.02, is indivisible because subsections (1) and (3) are not distinct offenses, but are rather separate means of committing one burglary offense. The Fifth Circuit further held that Texas Penal Code § 30.02(a)(3) does not correspond to the generic definition of burglary because it criminalizes entry and *subsequent* intent formation rather than entry *with* intent to commit a crime. Because neither of Herrold's two convictions under Texas's burglary statute could serve as predicates of a sentence enhancement under the Armed Career Criminal Act ("ACCA"), the Fifth Circuit vacated the district court's ACCA sentence enhancement and remanded for resentencing.

Villegas-Sarabia v. Sessions, 874 F.3d 871 (5th Cir. 2017).

The Fifth Circuit denied the petition for review in part, concluding that the petitioner's conviction in violation of 18 U.S.C. § 4—misprision of felony— is categorically a CIMT because misprision of a felony requires an affirmative act to conceal a crime—this offense "necessarily entails deceit." Noting a circuit split, the court adopted the Eleventh Circuit's approach rather than that of the Ninth Circuit in concluding that the offense is a CIMT.

While Villegas-Sarabia's petition for review was pending with the Fifth Circuit, the Supreme Court decided *Morales-Santana*, which held that INA § 309(c)[1] is unconstitutional and that the general residency requirements of INA § 301[2] apply, prospectively, to all individuals, regardless of whether they were born to unmarried U.S. citizen mothers or fathers. *See Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017). The Supreme Court emphasized in *Morales-Santana* that its decision would affect future rights only. *Id.* In light of *Morales-Santana*, the Fifth Circuit dismissed Villegas-Sarabia's argument that the current version of INA § 301 should apply to him retroactively.

United States v. Perlaza-Ortiz, 869 F.3d 375 (5th Cir. 2017).

The Fifth Circuit held that section 22.05(b) of the Texas Penal Code—discharging a firearm—is not divisible as its subsections provide alternate means for committing the same offense of deadly conduct, and may not be used as the basis for a crime-of-violence sentencing enhancement. The Fifth Circuit vacated Perlaza-Ortiz's sentence and remanded to the district court for resentencing.

[1] INA § 309(c) states: a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

[2] INA § 301 sets forth the rules for determining who shall be nationals and citizens of the United States at birth by establishing a range of residency and physical-presence requirements calibrated primarily to the parents' nationality and the child's place of birth.

United States v. Rutilio Reyes, 866 F.3d 316 (5th Cir. 2017).

The Fifth Circuit held that Illinois aggravated battery statute, 720 Ill. Comp. Stat. Ann. § 5/12-3.05, is divisible because it contained (at least) two different crimes requiring different proofs, and a conviction under section 5/12-3.05(f)(1) is a discrete offense based on the use of a deadly weapon that necessarily involved "the use of force," Therefore, a conviction under section 5/12-3.05(f)(1) qualified as a crime of violence under the U.S. Sentencing Guidelines.

United States v. Martinez-Rodriguez, 857 F.3d 282 (5th Cir. 2017).

The Fifth Circuit held that the district court erred in applying a "crime of violence" sentence enhancement for "injury to a child" under Texas Penal Code § 22.04(a) because the statute is indivisible as its alternative components are means and not elements. The Fifth Circuit added that Texas Penal Code § 22.04(a) is not categorically a crime of violence under 18 U.S.C. § 16 because said offense may be committed by both acts and omissions. In reaching this conclusion, the Court relied on the Texas Court of Criminal Appeals' conclusion that the Texas Legislature intended the "act or omission " language in the statute to "constitute the means of committing the course of conduct element of injury to a child" rather than elements of the offense "about which a jury must be unanimous." A conviction under Texas Penal Code § 22.04(a), therefore, does not amount to an aggravated felony, as defined in INA § 101(a)(43).

United States v. Jones, 854 F.3d 737 (5th Cir. 2017).

The Fifth Circuit held that Jones' conviction for carjacking in violation of 18 U.S.C. § 2119 "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" to qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3). The Fifth Circuit relied on its precedent in the bank robbery context that a similar taking "by force and violence, or by intimidation" was a crime of violence under the U.S. Sentencing Guidelines, with an identical definition. *See United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017) (holding that the bank robbery statute, 18 U.S.C. § 2113(a) is a crime of violence).

United States v. Guillen-Cruz, 853 F.3d 768 (5th Cir. 2017).

Guillen-Cruz was convicted of illegal reentry and the district court added a sentence enhancement for his prior conviction for exporting defense articles on the U.S. Munitions List without a license, or exporting high-capacity rifle magazines without a license, in violation of 22 U.S.C. § 2778(b)(2) and (c). On appeal, the Fifth Circuit compared Guillen-Cruz's conduct to the statutory definitions for "firearm" under 18 U.S.C. § 921(a)(3), "destructive device" under § 921(a)(4), and "explosive materials" under § 841(c). The Fifth Circuit found that a magazine that houses ammunition did not match any of these definitions in the statute, and thus under the modified categorical approach the sentence enhancement was clear error. The Fifth Circuit also stated that the district court committed plain error under the categorical approach because the munitions list included other

items not clearly within INA § 101(a)(43)(C), such as "[w]arships and other combatant vessels," and "[r]adar systems and equipment," rendering the statute categorically overbroad. Similarly, the Fifth Circuit rejected the Government's argument that INA § 101(a)(43)(E)(ii) could sustain the sentence enhancement. The Government claimed Guillen-Cruz's conviction proves an offense in 18 U.S.C. § 924(b) for shipping, transporting, or receiving a firearm or any ammunition in interstate or foreign commerce. However, the Fifth Circuit found "magazine(s)" were neither firearms nor ammunition for purposes of 18 U.S.C. § 924 as incorporated within INA § 101(a)(43)(E)(ii).

United States v. Castillo-Rivera, 853 F.3d 218 (5th Cir. 2017).

Castillo-Rivera was convicted of illegal reentry and the district court added a sentence enhancement for his prior conviction of an aggravated felony under INA § 101(a)(43)(E)(ii) for any "offense described in . . . section 922(g)(1) . . . relating to firearms offenses." Castillo-Rivera was convicted under Texas Penal Code § 46.04, which is the Texas felon-in-possession counterpart to 18 U.S.C. § 922(g)(1). The Fifth Circuit held that Castillo-Rivera did not establish a realistic probability that Texas courts would actually apply Texas Penal Code § 46.04, unlawful possession of a firearm by a felon, more broadly than 18 U.S.C. § 922(g)(1), and thus his conviction was for an aggravated felony under sentencing guidelines incorporating INA § 101(a)(43)(e)(ii).

CRIMINAL

Shroff v. Sessions, No. 17-60042, —F.3d —, 2018 WL 2222659 (5th Cir. May 15, 2018).

Shroff, a lawful permanent resident, pled guilty to online solicitation of a minor in violation of Texas Penal Code § 33.021(c). An Immigration Judge found that Shroff's conviction rendered him removable, which the Board affirmed. On appeal, the Fifth Circuit found that the Supreme Court's generic definition of a minor as anyone under the age of sixteen from *Esquivel-Quintana v. Sessions*, 137 U.S. 1562 (2017) applies in the context of online solicitation of a minor. The Fifth Circuit stated that *Esquivel-Quintana*'s age limit of sixteen applies equally to both subsections of Texas Penal Code § 33.021(a)(1), which defines a minor as anyone under the age of seventeen or anyone who appears to be under the age of seventeen. As such, the Fifth Circuit held that *Esquivel-Quintana*'s generic definition of a minor renders Texas Penal Code § 33.021(c) overbroad and does not qualify as sexual abuse of a minor for purposes of removability. Accordingly, the Fifth Circuit granted Shroff's petition and reversed and remanded the BIA's decision.

United States v. Reyes-Contreras, 882 F.3d 113 (5th Cir. 2018).

The Fifth Circuit vacated the district court's judgment and remanded, concluding that Reyes-Contreras' conviction in violation of Missouri's voluntary manslaughter statute, Mo. Ann. Stat. §

565.023, is divisible because the statutory framework and state case law as a whole demonstrate that subsection (1) and section (2) of the statute are offenses with distinct elements. The Fifth Circuit found that subsection (1) of the statute matches the generic definition of manslaughter and is a crime of violence, but stated that subsection (2) of the statute was not generic and did not contain the use of force as an element. Because the documents of Reyes-Contreras's conviction under such statute did not indicate the subsection of his conviction, the district court's judgment of sentence was vacated and remanded for resentencing.

United States v. Johnson, 880 F.3d 226 (5th Cir. 2018).

The Fifth Circuit affirmed the district court's judgment, concluding in part that the petitioner's felony convictions in violation of Mississippi armed carjacking statute, Miss. Code Ann. § 97-3-117, are crimes of violence under the U.S. Sentencing Guidelines § 2K2.1(a)(4)(A) ("crime of violence" given the same meaning as U.S.S.G. § 4B1.2(a), which is the same as 18 U.S.C. § 16(a)). The Fifth Circuit concluded that, as far as *armed* carjacking is concerned, the "force or violence" element necessarily entails, at a minimum, the threatened use of *violent* force. The Fifth Circuit saw no realistic probability that a conviction could be obtained under Miss. Code Ann. § 97-3-117 just "so long as a firearm is 'readily available.'" As such, the Fifth Circuit held that Mississippi armed carjacking is categorically a crime of violence under the U.S. Sentencing Guidelines.

Laryea v. Sessions, 871 F.3d 337 (5th Cir. 2017).

The Fifth Circuit held that Texas Penal Code § 38.04, evading arrest or detention, is a divisible statute because its subparts articulate different crimes: the felony acts, described in subpart (b), are "'different crimes' from the misdemeanor offense described in subpart (a)." As such, a conviction under subpart (a) of that statute for the Class A misdemeanor of fleeing lawful arrest is not a CIMT.

United States v. Reyes-Ochoa, 861 F.3d 582 (5th Cir. 2017).

The Fifth Circuit held that statutory burglary under Virginia Code §18.2-90 is indivisible as it sweeps broader than the generic burglary of a dwelling, and not categorically a crime of violence under the sentencing guidelines. A conviction under this statute also does not amount to an aggravated felony, as defined in INA § 101(a)(43). As such, the Fifth Circuit vacated Reyes-Ochoa's sentence and remanded for resentencing.

United States v. Rico-Mejia, 859 F.3d 318 (5th Cir. 2017).

Rico-Mejia challenged his criminal sentence enhancement based on the district court's finding that his conviction for first-degree terroristic threatening in violation of Arkansas Code § 5-13-301(a)(1)(A) was a crime of violence under the U.S. Sentencing Guidelines. The Fifth Circuit

held that terroristic threatening in violation of Ark. Code Ann. § 5-13-301(a)(1)(A) cannot constitute a crime of violence under the U.S. Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) because it lacks physical force as an element. The Fifth Circuit agreed with Rico-Mejia and its previous case law on this issue that even if the conduct may involve a threat to kill, a person could cause physical injury without using physical force.

United States v. Lobaton-Andrade, 861 F.3d 538 (5th Cir. 2017).

Lobaton-Andrade challenged his criminal sentence enhancement, arguing that his conviction under Arkansas's manslaughter statute, Ark. Code § 5-10-104, did not qualify as manslaughter, an enumerated "crime of violence" under the U.S. Sentencing Guidelines because Arkansas permits a conviction for a *mens rea* of only negligence. The Fifth Circuit held that Arkansas's manslaughter statute is categorically overbroad compared to manslaughter, an enumerated "crime of violence" in the U.S. Sentencing Guidelines. The Fifth Circuit also held that the statute is indivisible, as the alternative mental states were merely means, not elements, such that modified categorical approach could not be applied for sentencing enhancement.

United States v. Montiel-Cortes, 849 F.3d 221 (5th Cir. 2017).

The Fifth Circuit held that a conviction under the Nevada robbery statute, Nev. Rev. Stat. Ann § 200.380, is a "crime of violence" as defined under the U.S. Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). In determining whether the Nevada robbery statute proscribes conduct that falls within the generic, contemporary meaning of robbery, the Fifth Circuit first explained that, although generic robbery may be broad enough to encompass fear concerning injury to property in addition to personal injury, the danger must still be immediate. Therefore, because the Nevada statute covered not just immediate danger but also future danger, the Fifth Circuit concluded that it was broader than the generic, contemporary definition of robbery. However, the Fifth Circuit also found that the least culpable conduct under the Nevada statute also qualified as a crime of violence. Specifically, the Fifth Circuit determined that the least culpable conduct (involving future danger), which did not qualify as the enumerated "crime of violence" of robbery, nevertheless still qualified as generic extortion, another "crime of violence."

Ibanez-Beltran v. Lynch, 858 F.3d 294 (5th Cir. 2017).

The Fifth Circuit held that attempted transportation of marijuana for sale in violation of Arizona Revised Statute § 13-3405(A)(4) is divisible such that the modified categorical approach narrows the alien's conviction for "attempted transportation of marijuana for sale." This offense also matches a felony punishable under the Controlled Substances Act, making it a drug trafficking crime, which is an aggravated felony under INA § 101(a)(43)(B).

OTHER

Nunez v. Sessions, 882 F.3d 499 (5th Cir. 2018).

The Fifth Circuit denied the petition for review, concluding that the petitioner received proper notice of her hearing in removal proceedings, where notice was sent via regular mail to the address she provided, but was returned at the request of an unidentified person. The Fifth Circuit held that the IJ did not err in finding that Garcia-Nuñez failed to receive notice of her hearing due to "some failure in the internal workings of the household," not failed delivery. *Ojeda-Calderon v. Holder*, 726 F.3d 669, 673 (5th Cir. 2013) (quoting *Matter of G-Y-R-*, 23 I&N Dec. 181, 189 (BIA 2001)). Although the notice was stamped as "not deliverable," the notice was delivered to the correct address but returned at the request of a person living at the address. Further, proper notice does not require the alien or a responsible household member to actually view or sign the notice.

The Fifth Circuit also held that the petitioner's motion to reopen based on changed country conditions was properly denied because she did not show a material rather than incremental change in country conditions. The Fifth Circuit reiterated that a showing of changed country conditions requires "a meaningful comparison" between the conditions at the time of the removal hearing and at the time of filing the motion to reopen. The change must be material, not "merely incremental." The continuation of a trend, individual incidents not part of a larger material change, and changed personal circumstances do not suffice.

Gonzalez-Cantu v. Sessions, 866 F.3d 302 (5th Cir. 2017).

Gonzalez-Cantu was removed from the United States in 2000, and she filed a motion to reopen in 2015. The IJ denied the motion as untimely, and the BIA dismissed the appeal. Gonzalez-Cantu petitioned for review of the BIA denial, contending that the filing deadline for her motion to reopen should have been equitably tolled until she discovered *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012), which held that aliens have a statutory right to file a motion to reopen regardless of whether they have left the United States. In assessing Gonzalez-Cantu's arguments, the Fifth Circuit first noted that she did not specify *when* she learned of *Garcia-Carias*. Because she failed to establish that she learned of *Garcia-Carias* no more than 90 days before the filing of her motion to reopen, the Fifth Circuit found that Gonzalez-Cantu did not meet her burden to show that equitable tolling applied.

United States v. Soriano Arrieta, 862 F.3d 512 (5th Cir. 2017).

The Fifth Circuit affirmed the judgment of the district court, denied the petitioner's motion to dismiss and concluded that the petitioner's receipt of DACA neither conferred nor altered his immigration status so as to impact his conviction under 18 U.S.C. § 922(g)(5)(A) of possession of a firearm and ammunition while unlawfully present in the United States.